



March 15, 2006

United States
Department of
Agriculture

Food and
Nutrition
Service

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Alexandria, VA
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SUBJECT: Final WIC Policy Memorandum #2006-6
Vendor Cost Containment Interim Rule Clarification

TO: Regional Directors
Supplemental Food Programs
All Regions

This policy memorandum updates the guidance provided in Final WIC Policy Memorandum #2006-4, dated January 11, 2006, regarding the implementation of the WIC Vendor Cost Containment Interim Rule, published in the *Federal Register* on November 29, 2005, at 70 FR 71708. On February 23, 2006, the U.S. District Court for the District of Columbia dismissed the lawsuit filed by the National Women, Infants, and Children Grocers Association (NWGA) and other plaintiffs to halt implementation of the Interim Rule. The court also vacated the temporary restraining order of December 29, 2005, which had enjoined the Food and Nutrition Service (FNS) from enforcing two provisions of the Interim Rule. The court's decision has cleared the way for us to provide further instructions and clarifications regarding corrective actions State agencies must take in order to be in compliance with the Interim Rule by September 30, 2006.

State Agency Responsibility to Comply with the Interim Rule

All State agencies should be moving forward with efforts to implement all applicable provisions of the Vendor Cost Containment Interim Rule. By now, all State agencies should have identified above-50-percent vendors and, if they wish to authorize such stores, submitted to FNS a request for vendor cost containment certification. If FNS determines that a State agency has already implemented appropriate competitive price criteria and allowable reimbursement levels, FNS will certify that the State agency's cost containment methodologies meet regulatory requirements. To obtain certification, the State agency must demonstrate that its competitive price criteria and allowable reimbursement levels do not result in higher average payments per food instrument to above-50-percent vendors than to comparable regular vendors (section 17(h)(11)(E) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(h)(11)(E)) and section 246.12(g)(4)(vi) of the Interim Rule).

State agencies that wish to authorize above-50-percent vendors, but have not yet submitted a request for certification should do so as soon as possible, following the instructions contained in the draft Vendor Cost Containment Guidance issued in July 2005. FNS will review the methodologies that a State agency proposes to employ and will approve them or advise the State agency of needed changes. Once FNS approves a State agency's proposed competitive pricing and allowable reimbursement methodologies, the State agency should implement its plan promptly so that it may receive certification by September 30, 2006.

Effective January 1, 2006, all State agencies with above-50-percent vendors were required to compute new maximum allowable reimbursement levels for food instruments considering only the prices of regular vendors, and to ensure that average payments to above-50-percent

vendors for food instruments (by type) issued on or after January 1 do not exceed average payments to comparable regular vendors. Any State agency that chose to delay this process pending the resolution of the NWGA lawsuit must take steps immediately to comply with this requirement.

State agencies that do not have any above-50-percent vendors also should be taking corrective action to implement all relevant provisions of the Interim Rule (i.e., provisions other than those related to above-50-percent vendors) by September 30, 2006. Requests for exemption from the vendor peer group system requirement in the Interim Rule should be submitted to FNS as soon as possible, in order to allow sufficient time for implementation of peer groups if an exemption is not granted. In addition to using the information contained in the draft Guidance on Vendor Cost Containment issued in July 2005, a State agency that intends to request a peer group exemption should obtain from the Regional Office supplemental instructions for submitting data to support the request.

Achieving Overall Cost Neutrality

Section 246.12(g)(4)(i)(D) of the Interim Rule is intended to implement the statutory requirement that State agencies must ensure that above-50-percent vendors do not result in higher costs to the program than if participants had transacted their food instruments at regular vendors (section 17(h)(11)(A) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(h)(11)(A))). This section of the rule requires State agencies to compare average payments to **all** above-50-percent vendors to average payments to **all** regular vendors. If average payments per food instrument to all above-50-percent vendors do not exceed average payments to all regular vendors, then the State will have achieved the required *outcome* of cost neutrality.

The certification process required by section 246.12(g)(4)(vi) of the Interim Rule considers the *means* by which State agencies achieve this outcome. During the certification process State agencies must demonstrate that their methods for implementing competitive price criteria and allowable reimbursement levels will not result in higher average payments per food instrument to above-50-percent vendors than to comparable regular vendors. State agencies should employ competitive pricing methods and define comparable vendors in a way that will achieve the overall cost neutrality outcome required by section 246.12(g)(4)(i)(D) of the Interim Rule. State agencies are not required to limit payments to above-50-percent vendors more than is necessary to achieve cost neutrality.

Some State agencies have asked about acceptable approaches to establishing competitive price criteria and maximum reimbursement levels that will allow them to meet the cost neutrality requirement. The statute allows State agencies to employ a variety of competitive pricing approaches **provided that the approach used does not permit average payments to above-50-percent vendors to exceed average payments to regular vendors**. This memorandum rescinds the requirement in the December 21, 2005, email message that

State agencies must apply the same maximum reimbursement levels for above-50-percent vendors and comparable regular vendors.

Determining which method best achieves the cost neutrality goal may require some trial and adjustment. Examples of competitive pricing methods that State agencies may employ to meet certification requirements include (1) placing above-50-percent vendors in a peer group by themselves to which the State agency applies statewide competitive price criteria and statewide maximum reimbursement levels applicable to regular vendors; (2) placing all above-50-percent vendors in a single peer group with the regular vendors whose competitive price criteria and maximum reimbursement levels would ensure cost neutrality; and (3) placing above-50-percent vendors in the same peer group as regular vendors, but applying different competitive price criteria and allowable reimbursement levels to the above-50-percent vendors to assure cost neutrality. State agencies also may place above-50-percent vendors in peer groups with comparable regular vendors and apply the same competitive price criteria and allowable reimbursement levels to the above-50-percent vendors and the regular vendors, as long as this achieves overall cost neutrality as defined by section 246.12(g)(4)(i)(D).

With respect to the methodologies that State agencies may employ in order to ensure that they meet the overall cost neutrality requirement, State agencies are advised that FNS will not approve a request for certification for a State agency that plans to recoup monies that were paid to a vendor for food instruments redeemed **within** the established maximum allowable reimbursement level for that vendor. This does not preclude a State agency from making price adjustments to food instruments in accordance with 7 CFR 246.12(h)(3)(viii) of the WIC regulations and recouping amounts paid to the vendor above the established maximum allowable reimbursement rate applicable to the vendor.

Assessing Overall Cost Neutrality

In an email message dated December 21, 2005, we indicated that a State agency that authorizes above-50-percent vendors will be required to submit data to FNS for the period from January 1, 2006, through September 30, 2006, no later than January 1, 2007, to demonstrate whether the cost neutrality requirement had been met. Due to delays associated with the NWGA lawsuit, we have changed the period for which data will be required to July 1, 2006, through September 30, 2006, and will allow State agencies the option of using a simple average rather than a weighted average when assessing cost neutrality in fiscal year 2006. We will be issuing further guidance to State agencies on cost neutrality requirements and options.

This memorandum is effective immediately.



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